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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

James Edward Clark,

Petitioner,

vs.

Robert Poulton, Utah State Corrections Department, David Jorgenson, Salt Lake County Sheriff's Office, and John Does I through X,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner James Edward Clark submits this Reply to the Brief in Opposition filed by the Respondents in this matter.

INTRODUCTION AND SUMMARY

Respondents submit that Clark's civil rights action was properly referred to the magistrate pursuant to 28 U.S.C. § 636(b)(1)(B) because it challenged a "condition of confinement." Br. Opp. 6-9. They next assert that, even if the reference was not authorized under Section 636(b)(1)(B), it was authorized under Subsection 636(b)(3) -- which they

characterize as a broad "catchall" provision. Br. Opp. 9-11. Respondents then assert that Clark's failure to object to proceedings before the magistrate waived any defect (Br. Opp. 11-13), and claim that the court of appeals properly presumed, despite the absence of any record evidence, that the district court had fulfilled its statutory and constitutional de novo review obligations. Br. Opp. 14-18. These observations are in some respects inaccurate, and in every instance insufficient to avoid review by this Court.

First, the court of appeals decided this case on the express assumption that Clark's first claim could not be referred under Section 636(b)(1)(B) because it did not challenge a condition of confinement. Pet. App. 7a-8a, 16a-17a. Respondents' expansive reading of Section 636(b)(3), moreover, conflicts with this Court's decisions in Peretz v. United States, 111 S. Ct. 2661 (1991), and Gomez v. United States, 490 U.S. 858 (1989), as well as the structure and legislative history of the Magistrates Act. Moreover, Respondents' "waiver" argument disregards the conflicting welter of views in the lower courts and ignores the fact that the Court has previously granted certiorari on the precise question presented here but then declined to address the issue. Finally, despite Respondents' effort to distinguish the cases cited in the Petition, the court of appeals' willingness to "presume" that the district court had conducted

de novo review flies in the face of numerous decisions that have rejected any such "presumption."

I. CLARK'S FIRST CLAIM DOES NOT CHALLENGE A "CONDITION OF CONFINEMENT" AND THEREFORE IS NOT REFERABLE UNDER SECTION 636(B)(1)(B)

Respondents' first submission is that Clark's action was properly referred under Section 636(b)(1)(B) because both of his claims challenge "conditions of confinement," as that term is defined in McCarthy v. Bronson, 111 S. Ct. 1737 (1991). Br. Opp. 6-9. Respondents bemoan "Clark's narrow definition of confinement" and assert that this action "does not involve a prisoner's lawsuit concerning actions that occurred before his confinement." Br. Opp. 8-9 (emphasis in original). All of this is beside the point, however, because -- contrary to the premise underlying Respondents' argument -- the court of appeals decided this case on the assumption that it involved pre-confinement wrongdoing.

The panel majority concluded that, because Clark's second claim involved an incident following his confinement, the referral of that claim was "authorized by section 636(b)(1)(B)." Pet. App. 8a. The majority, however, did not reach the same conclusion regarding Clark's first claim. Instead, the panel assumed that the reference of this claim was not authorized by Section 636(b)(1)(B) and went on to hold that the reference was proper under Section 636(b)(3). Pet. App. 8a. Why the panel did so was aptly explained by Judge Seymour (Pet. App. 17a) (emphasis in original):

> In [the first claim], we consider a claim of excessive force incident to arrest and prior to incarceration; the plaintiff simply happened to be in prison at the time he filed suit. Although under McCarthy isolated incidents are now considered conditions of confinement, the absence of confinement is the dispositive factor here.

Thus, contrary to Respondents' submission, this litigation cannot be disposed of on the ground that reference of the first claim was authorized by Section 636(b)(1)(B). The court below was not willing to make such a ruling,[1] and this Court should not deny certiorari on a ground rejected by the court of appeals. The court of appeals concluded that Clark's first claim was properly referred to the magistrate under Section 636(b)(3). That ruling, absent intervention by this Court, will become binding precedent. That ruling, moreover, conflicts with this Court's construction of the Magistrates Act and decisions from other circuit courts. Pet. at 13-18. Accordingly, review is plainly warranted.

II. RESPONDENTS' BROAD READING OF SECTION 636(B)(3) IGNORES THIS COURT'S DECISIONS IN PERETZ AND GOMEZ AND CONFLICTS WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE MAGISTRATES ACT

Respondents next submit that reference of Clark's first claim was proper under Section 636(b)(3) because, as construed by this Court in Peretz v. United States, 111 S. Ct.

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1. Cf. Pet. App. 17a ("to construe 'confinement' so broadly as to include the facts as issue here would render that term virtually meaningless") (Seymour, J., dissenting).

2661 (1991), the statute is a broad "'catchall' provision." Br. Opp. 9. Respondents, however, seriously misread the import of Peretz and disregard the language and structure of the Magistrates Act.

This Court has previously held that Section 636(b)(3) does not authorize the non-consensual reference to a magistrate of a felony jury voir dire. Gomez v. United States, 490 U.S. 858. In Peretz, this Court concluded that -- upon the express consent of the criminal defendant -- Section 636(b)(3) does authorize reference of a felony voir dire. Peretz, 111 S. Ct. at 2667 ("This case differs critically from Gomez because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it"). Thus, Gomez and Peretz make clear that a crucial limitation on the construction of Section 636(b)(3) is affirmative consent. With consent, the reach of the section may be broad. But, without actual consent, the Court is "reluctant" to construe the clause to confer powers beyond those expressly set out in the Magistrates Act. Peretz, 111 S. Ct. at 2667.

Here, there is no basis for according Section 636(b)(3) the broadest possible reach Peretz might justify. Clark never consented to proceedings before the magistrate.[2] Accordingly, Peretz does not justify

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2. Counsel for Clark did consent to consolidation of his claims against the state and the county. Br. Opp. 3 & n.1. There is absolutely nothing in the record, however,

Footnote continued on next page.

Respondents' expansive construction of the Magistrates Act. Cf. Peretz, 111 S. Ct. at 2668-69 ("If a defendant perceives any threat of injury from the absence of an Article III judge in the jury selection process, he need only decline to consent to the magistrate's supervision to ensure that a judge conduct the voir dire"). Clark, of course, was never given any opportunity to "decline to consent to the magistrate's supervision" of his case. Id.

Respondents (and the court of appeals) completely overlook the crucial role of express consent in determining the reach of Section 636(b)(3). Instead, they assert that even in the absence of a defendant's explicit objection, Section 626(b)(3) authorizes a Magistrate to perform any function "of comparable importance to the specific grant[s] of authority" under the Magistrates Act. Br. Opp. 10; accord Pet. App. 10a-11a. As Judge Seymour pointed out in her dissent, this reading of the "additional duties" clause "render[s] the specific limitations [of the Magistrates Act] a nullity." See Pet. App. 24a.[3] Moreover, Respondents' construction of Section 636(b)(3) plainly is not the

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Footnote continued from previous page.
to indicate that he consented to the hearing before the magistrate, and nothing in the record suggesting that consenting to consolidation solely for purposes of convenience could erase a patent jurisdictional flaw in one "half" of the consolidated case.

3. Judge Seymour noted that the panel's -- and Respondents' -- construction of Section 636(b)(3) essentially reads Section 636(c) out of the Magistrates Act. Pet. App. 24a.

construction of the statute given by the Court in Peretz. E.g., Peretz, 111 S. Ct. at 2667 ("We therefore conclude that the Act's 'additional duties' clause permits a magistrate to supervise jury selection in a felony trial provided the parties consent") (emphasis added).

Thus, far from demonstrating that Clark's petition should be denied, the construction of Section 636(b)(3) set out by Respondents highlights the pressing need for review. The court of appeals has not only overlooked the crucial role of consent enunciated in Gomez and Peretz, it has also disregarded the legislative history of the Magistrates Act (Pet. at 14 n.13) and conflicting decisions from other circuits (Pet. at 15-18). Perhaps most importantly, however, the decision below "enables a district court to force litigants to try their disputes before a non-Article III judge." Pet. 18. That prospect alone justifies intervention by this Court.

III. THERE IS AN ACUTE SPLIT OF AUTHORITY ON THE WAIVER ISSUE PRESENTED HERE

Respondents brush aside the existing split of authority on the second question presented in the Petition, arguing that the fact that the courts of appeals are in hopeless disarray as to whether improper references are waivable defects or nonwaivable jurisdictional errors "does not demonstrate a conflict in the circuits." Br. Opp. 12. The assertion is absurd.

As Respondents acknowledge, some courts of appeals have held that improper references under Section 636(c) are nonwaivable, jurisdictional defects. Br. Opp. 12. See Pet. at 19 n.17 (collecting cases). Other courts, as Respondents also acknowledge, have held that improper references under Section 636(b) are waivable, "procedural" errors. Br. Opp. 12. See Pet. at 19 n.18. Although Respondents apparently see no incongruity in construing the Magistrates Act in such a haphazard fashion (with errors relating to one section being deemed "procedural" and errors concerning another section "jurisdictional") (Br. Opp. 12), this Court has not been as blithe. Indeed, the Court has previously acknowledged the conflict on the waiver question by directing the parties in Peretz to address it. Peretz, 111 S. Ct. at 2664. And, as is evidenced by the cases cited in the Petition (at 18-20), the conflict continues unabated.

In a veiled attempt to avoid a conflict they cannot convincingly deny, Respondents imply that this Court has already resolved the waiver question in Peretz. Br. Opp. 12 (quoting Peretz, 111 S. Ct. at 2671). This Court, however, declined to reach the waiver question in Peretz because it found that the criminal defendant in that case had expressly consented to the reference to the magistrate. Peretz, 111 S. Ct. at 2671 ("Our disposition of the statutory and constitutional questions makes it unnecessary to discuss the third question that we asked the parties to brief and to

argue"). And, as Judge Seymour pointed out in dissent below, the quote from Peretz set out in the Brief in Opposition (at 12) "simply cannot logically be read . . . as dicta on the issue the Court specifically stated it was not deciding: i.e., whether an unauthorized referral is a matter subject to waiver." Pet. App. 27a.[4]

The courts of appeals are hopelessly divided as to whether improper references under the Magistrates Act are waivable defects. Pet. at 18-20. This Court has previously granted certiorari on the issue, but declined to resolve the controversy. Peretz, 111 S. Ct. at 2664, 2671. The Court may and should settle the matter in this case.

IV. THE DECISION BELOW, IN CONFLICT WITH RULINGS FROM NUMEROUS COURTS, DISREGARDS AN APPELLATE COURT'S OBLIGATION TO INSURE THAT DE NOVO REVIEW ACTUALLY TAKES PLACE

Respondents claim that "[t]he hearing before the magistrate judge was an evidentiary hearing where the district court retained full authority over the action and its resolution" (Br. Opp. 13), and then quite inconsistently assert that the district court adequately exercised that "full authority" by simply intoning that it had "made a de novo review." Br. Opp. 14-18; Pet. App. 59a. Respondents and the lower court maintain this position despite the absence of any evidence in the record that the district court actually

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4. As Judge Seymour explained, the Court's closing comments in Peretz do "no more than bolster its resolution of the issues of statutory construction and constitutionality it had actually decided." Pet. App. 27a.

reviewed a transcript or a tape recording of the proceedings before the magistrate. Br. Opp. 14-18; Pet. App. 14a-15a. However, the Magistrates Act, Article III, and every other court to address the issue require much more of the district court.

Respondents are quite right in asserting that the Magistrates Act and Article III require a federal court to retain "full authority" over the "resolution" of an action referred to a magistrate under Section 636(b)(3). This statutory and constitutional obligation, however, is only fulfilled when the court makes a "de novo determination" of "proposed findings or recommendations to which objection is made." 28 U.S.C. § (b)(1)(C). This de novo review obligation, moreover, is of such importance than an appellate court must not simply "presume" that a lower court is in compliance. Indeed, counsel for Petitioner have been unable to find any appellate decision -- except for the opinion of the panel below -- which has been willing to "presume" that a lower court has performed its statutory and constitutional review obligations. Pet. at 20-23 (citing cases).[5]

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5. Respondents, for example, do not avoid the clear conflict between the decision below and Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989). If the Eighth Circuit in Branch had been willing to rely upon the same "presumption" invoked by the court below, it would not have reversed -- but would have cited its earlier decision in Thompson v. Scurr, 668 F.2d 999 (8th Cir.), cert. denied, 459 U.S. 883 (1982), as the basis for "presuming" that the district court "knew the law."

Respondents attempt to distinguish away the cases cited in the petition by asserting that some do "not even address the question of whether the district court judge must read the transcript or listen to [a] tape recording" in conducting de novo review. Br. Opp. 15. But, any proffered "distinctions" based on factual differences in the cases do not help Respondents.

For example, in Fowler v. Jones, 899 F.2d 1088 (11th Cir. 1990), the district court erroneously authorized a magistrate to conduct a trial without obtaining the express consent of the defendant under Section 636(c). On appeal, the appellee argued that any error in the reference to the magistrate was harmless, because the district judge was present (sitting next to the magistrate) throughout trial; apparently, the judge had lost his voice and merely permitted the magistrate to conduct the trial for him. Id. at 1093. The Eleventh Circuit rejected the argument that the judge's presence throughout the proceedings obviated any error:

> The circuit courts have found the Magistrates Act to be consistent with Article III and due process requirements based on the statutory safeguards which require either that magistrates' dispositive decisions are subject to de novo review or that the parties expressly consent to trial by a magistrate.
>
> * * *
>
> We cannot presume, where no evidence exists in the record to support such a presumption, that the Article III judge was playing an active role in making rulings, or even in reviewing the magistrate's rulings as they were made during the course of the trial. To allow the requirement of express consent to be circumvented by having an Article III judge be physically present while a magistrate conducts a

> trial runs counter to the clear constitutional and statutory limitations on magistrates' jurisdiction. Therefore, we must reverse the judgment and remand for a new trial.

Id. at 1093.

If the actual physical presence of a judge throughout a trial is insufficient for the Eleventh Circuit to presume that a judge was "playing an active role in making rulings, or even in reviewing the magistrate's rulings," id. at 1093, it is inconceivable that a district judge's simple declaration that he has "made a de novo review" (Pet. App. 59a) can be given precisely that effect. This is especially true where, as here, it is uncontroverted that no written transcript of the hearing before the magistrate had been prepared when the district court entered its order dismissing Clark's claims.[6]

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6. Respondents asserts that Clark is merely seeking a "shibboleth," because the trial court has already stated that it has conducted de novo review and any further requirements of the district court will not make its review any more "trustworthy." Br. Opp. 18. Petitioner, of course, disagrees with Respondents' characterization of the issue. There is a vast difference between a mere announcement that a court has "made a de novo review" (Pet. App. 59a), and evidence in the record demonstrating what actual steps the court has undertaken in the course of that review. The issue here is not, as Respondents suggest, "truthfulness of the trial court's . . . avowal" (Br. Opp. 18), but rather whether the Magistrates Act and Article III place any enforceable limits at all upon a trial court's conduct of de novo review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECLARATION OF SERVICE OF PETITIONER JAMES EDWARD CLARK'S REPLY BRIEF IN SUPPORT OF GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I hereby certify that, pursuant to paragraphs .3 and .5 of this Court's Rule 29, on the 3rd day of November 1992, service of Petitioner James Edward Clark's **PETITIONER'S REPLY BRIEF IN SUPPORT OF GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT** was effected by placing one copy thereof in the United States Mail, postage prepaid, addressed as follows:

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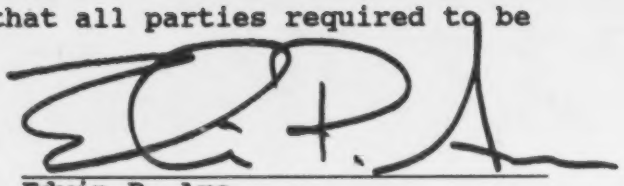
I further certify that all parties required to be served have been served.



Edwin P. Aro

Subscribed and sworn before me this 3rd day of November 1992 by Edwin P. Aro.

Brenda P. Linzart

Notary Public